SIM LIM FINANCE LIMITED v. PELANDOK ENTERPRISES PTE. LTD. & ANOR.

[O.C.J. (Wee Chong Jin C.J.) March 26, 1981]
[Singapore — Suit No. 3146 of 1980]

Practice and Procedure — Judgment — Rate of interest on — R.S.C. 1970, O. 42 r. 12, O. 83 r. 4 — Supreme Court of Judicature Act (Cap. 15), ss. 18(2), 80(2)(j) and First Schedule, para. 7.

In this case the plaintiffs sued the defendants for monies advanced to the first defendant under a mortgage. They applied for leave to enter judgment under Order 83 rule 4 against the first defendant in default of appearance for $1,755,691.90 and interest at the rate of $1,024.14 per day from October 1, 1980 until payment. The application was heard by the Registrar on February 10, 1981 who granted leave to enter judgment for the sum claimed and interest at the rate claimed from October 1, 1980 until the date of judgment and thereafter at 8% p.a. The plaintiffs appealed contending that they were not only entitled to interest at the rate claimed from October 1, 1980 until the date of judgment but also thereafter at the same rate until payment.

Held: the plaintiffs were entitled to retain their security until they were paid the principal sum and interest at 18 per cent (the covenanted rate) but they were not entitled under the present application for leave to enter judgment in default of appearance to interest on the judgment debt exceeding the statutory rate of 8 per cent prescribed under Order 42 rule 12.

Case referred to:-

(1) *Economic Life Assurance Society* v. *Usborne & Ors.* [1902] A.C. 147.

CIVIL SUIT.

Liu Yuen Ming for the plaintiff.

First defendants not represented.

Cur. Adv. Vult.

Wee Chong Jin C.J.: The plaintiffs, a finance company, sued the defendants for monies advanced to the first defendant under a mortgage. They applied for leave to enter judgment under Order 83 rule 4 against the first defendant in default of appearance for $1,755,691.90 and interest at the rate of $1,024.14 per day from October 1, 1980 until payment.

The application was heard by the Registrar on February 10, 1981 who granted leave to enter judgment for the sum claimed and interest at the rate claimed from October 1, 1980 until the date of judgment and thereafter at 8% per annum.* The plaintiffs now appeal contending that they were not only entitled to interest at the rate claimed from October 1, 1980 until the date of judgment but also thereafter at the same rate "until payment".

Order 42 rule 12 of the Rules of the Supreme Court provides:—

"12. Every judgment debt shall carry interest at the rate of 8 per centum per annum or at such other rate not exceeding the rate aforesaid as the Court directs, such interest to be calculated from the date of judgment until the judgment is satisfied."

Despite this Rule the plaintiffs contend that they are entitled to interest at the rate claimed until the judgment debt is satisfied. They rely on section 18(2) of the Supreme Court of Judicature Act and paragraph 7 of the First Schedule thereto. Section 18(2) reads:—

"18.—(2) Without prejudice to the generality of subsection (1) of this section the High Court shall have the powers set out in the First Schedule to this Act:

Provided that all such powers shall be exercised in accordance with any written law or Rules of Court relating to them."

Paragraph 7 of the First Schedule reads:—

"Power to direct interest to be paid on debts, including judgment debts, or on sums found due on taking accounts between parties, or on sums found due and unpaid by receivers or other persons liable to account to the Court."

It is contended that section 18(2) read with paragraph 7 of the First Schedule gives the court discretionary power to direct interest to be paid on a judgment debt and that in a case where as here, there is an agreement or covenant between the parties to pay interest at an agreed rate "as well after as before any judgment" the court has a discretionary power to order payment of interest at a rate exceeding the statutory rate of 8% per annum prescribed under Order 42 rule 12.

In support of this contention the plaintiffs rely on the case of *Economic Life Assurance Society* v. *Usborne & Ors.*[1] In my opinion that case is distinguishable. It decided where in a mortgage deed the mortgagor covenanted to repay the principal on a day named with interest at 5 per cent and if the principal was not then paid, to pay interest at that rate on so much of the principal as should remain unpaid, though the personal remedy on the covenant to pay a debt merges in a judgment and a judgment carries only 4 per cent interest, yet upon the true construction of the mortgage deed the mortgagees were entitled to retain their security until they were paid the principal sum and interest at 5 per cent. In that case the issue was not whether the mortgagees were entitled to interest on the judgment debt at 5 per cent or at the statutory rate of 4 per cent.

Similarly, in the present case, the plaintiffs are entitled to retain their security until they were paid the principal sum and interest at 18 per cent (the covenanted rate) but, in my judgment, they were not entitled under the present application for leave to enter judgment in default of appearance to interest on the judgment debt exceeding the statutory rate of 8 per cent prescribed under Order 42 rule 12.

Section 18(2) of the Supreme Court of Judicature Act read with paragraph 7 of the First Schedule thereto enables the court to direct interest to be paid and section 80(2)(j) gives power to the Rules Committee to make Rules of Court regulating the rate of interest payable on, *inter alia*, judgment debts. Order 42 rule 12 prescribed the maximum rate of 8 per cent per annum payable on every judgment debt and it has the force of law.

For these reasons the appeal is dismissed.

Appeal dismissed.

APPENDIX

R.E. Martin, Registrar: In this case, the plaintiffs, a finance company, suing on a mortgage, applied for leave to enter Judgment in default of appearance under Order 83 rule 4 of the Rules of the Supreme Court.

The plaintiffs applied to enter judgment in the following form:

"(1) The plaintiffs be at liberty to enter final judgment against the first defendants the sum of $1,755,671.90;

* The grounds of decision of the Registrar is reproduced as an appendix hereto.

(2) Interest at the rate of $1,024.14 per day from the 1st day of October 1980 *until payment*; and

(3) Costs."

(the emphasis is mine).

Upon query from me, Mr. Liu argued that interest at $1,024.14 per day (which works out to be 21.29% per annum) could be ordered even after judgment, despite Order 42 rule 12 of the Rules, which provides:

> "12. *Every* judgment debt *shall* carry interest at the rate of *8* per centum per annum *or at such other rate not exceeding the rate aforesaid as the Court directs,* such interest to be calculated from the date of judgment until the judgment is satisfied."
>
> (the emphasis is mine).

In support of his contention, he referred to section 80(2)(j) of the Supreme Court of Judicature Act which provides:

> "(2) Without prejudice to the generality of subsection (1) of this section, Rules of Court *may* be made for the following purposes:—
>
> ....
>
> ....
>
> (j) *regulating the rate of interest payable on all debts, including judgment debts,* or on the sums found due on taking accounts between parties, or on sums found due and unpaid by receivers or other persons liable to account to the court:
>
> Provided that in no case *shall* any rate of interest exceed eight per cent per annum, *unless it has been otherwise agreed between the parties;*"
>
> (the emphasis is mine).

Mr. Liu argued that the proviso in paragraph (j) provided the basis of the court to give effect in a judgment to an agreement that interest after judgment be at the agreed rate which may exceed 8%. In support, he cited the English case of *Economic Life Assurance Society* v. *Usborne* [1902] A.C. 147, which was factually on point, in that there was a clause in this case, as in Mr. Liu's case, that stipulated that the agreed rate was to apply even after judgment.

However, I found this case distinguishable in that it did not involve determination of provisions similar to paragraph (j) of the Act, or Order 42 rule 12 of the Rules. I therefore considered myself bound by Order 42 rule 12 ("*Every* judgment", "*shall*") and accordingly ordered that interest after judgment be at the rate of 8%.

Let me explain.

First, I had foremost in my mind that section 80(2)(j) of the Supreme Court of Judicature Act was nothing more than an enabling provision. It is a provision which allows the Rules Committee constituted under section 80(1) of the same Act to make Rules when it thinks necessary ("may"). It is not a provision a litigant could use *per se* to establish an entitlement, although it may be used to show that Rules made under it are *ultra vires* or otherwise.

Second, I considered the limit of the Rules Committee's power in terms of paragraph (j). This limit, as I saw it, was this:

(a) in cases where parties have *not* agreed the rate, the Rules Committee could regulate the rate of interest from 0% to not more than 8%; and

(b) in cases where parties have agreed the rate, the Rules Committee could regulate the rate of interest from 0% to the agreed rate, albeit beyond 8%.

To my mind, this meant that the legislature intended to give the Rules Committee, not a judge trying the case, the power and discretion to regulate the rate whatever that might be, so long as that rate did not exceed the maximum prescribed in paragraph (j). In this context, it is pertinent to note that the proviso in paragraph (j) is a proviso only in respect of the maximum rate of interest; it is not a proviso in respect of the minimum rate of interest, not a proviso the effect of which is that the Rules Committee has no power to enact rules regulating the rate of interest once it has been agreed upon by parties. It would therefore be well within the powers of the Rules Committee to even regulate a rate far below 8%, say 4%, for *both,* and I emphasize, *both,* situations where parties have either agreed upon the rate after judgment or when they have not.

Third, I gave Order 42 rule 12 its historical perspective and in so doing came to the conclusion that the Rules Committee intended that Order 42 rule 12 should apply to both or all situations. Under the 1934 Rules of the Supreme Court, the predecessor of Order 42 rule 12 was Order 39 rule 13, which read:

> "13. *Unless it has been otherwise agreed between the parties,* every judgment debt shall carry interest at the rate of six per centum per annum or at such other rate not exceeding the rate aforesaid as the court or a judge directs, such interest to be calculated from the date of judgment until the judgment is satisfied."
>
> (the emphasis is mine).

Clearly the underlined phrase has been left out in the present Order 42 rule 12. What I had to determine was: intentional or inadvertence? I was of the view that the omission was intentional. The underlined phrase represents the English position, as brought out in the case cited by learned counsel. To my mind, it would not have made any sense for the Rules Committee to have deleted the underlined phrase, which represents the English positions, for the purpose of following the English position, either as a result of paragraph (j) or by the full play of English authorities through omission in the Rules. It must therefore have occurred to the Rules Committee that they had the power and discretion to regulate the rate for both situations and accordingly exercised their discretion by standardizing the rate of interest by deleting the phrase "Unless it has been otherwise agreed between the parties...", so as to give full effect to the words "Every judgment" and "shall".

It becomes more than evident that the omission was intentional and not through inadvertence by blind incorporation of English Rules, if one considers that Order 42 rule 12 does not have its origin in the English rules, on which the 1970 Rules themselves have been modelled, but in the 1934 Rules, and because of this, the Rules Committee must have considered its predecessor in the 1934 Rules to have consciously introduced it without the opening phrase into the 1970 Rules. Indeed, against the backdrop of the financial scene in 1970, the rate of 8% must have seemed reasonable enough a rate, and I am of the view it was, for the Rules Committee to have wanted no distinction between cases where parties have agreed or have not agreed the rate of interest.

Perhaps, if I may be permitted to add, the rationale behind this deletion by the Rules Committee is as profound as the rationale behind the power of the court to refuse to enforce penalties *agreed upon* as being imposed in terrorem or to revise unconscionable rates of interest *agreed upon* in money-lending transactions. Contractual freedom is one thing, but to give permanence to it in a judgment, without so much as asking whether it is fair, is another. A balance between the interests of the judgment creditor and judgment debtor must be struck and the balance the Rules Committee may have perceived is that a judgment creditor should, after securing judgment and is provided the full range of enforcement modes (a facility he did not enjoy before judgment), act expeditiously in enforcing his judgment or proceeding to bankruptcy. To allow a judgment creditor the rate agreed upon is hardly an incentive to act expeditiously; for example, in the next five years in the present case, the judgment creditors could simply through the accrual of interest at the rate of 21.29% per annum double the principal sum owing to them.

Fourth, I considered other provisions dealing with interest. I considered section 9 of the Civil Law Act. I found it inapplicable, not only because of its proviso that the section was not to apply when interest has been agreed, but also because it covered only matters that have been "tried", which the present case was not, and covered interest between "the date when the cause of action arose and the date of the judgment", which was not the issue before me. I also considered paragraph 6 of the First Schedule to the Supreme Court of Judicature Act, but came to the conclusion that it dealt only with the "power" to direct interest to be paid and *not* the rate, which having been prescribed in Order 42 rule 12, and which provision has the force of law, meant

that a judge exercising that power had to exercise it according to law — that is, within the range prescribed in Order 42 rule 12.

Finally, I tested the reasoning of Mr. Liu's argument against other paragraphs in section 80(2) of the Act. One such paragraph was paragraph (1):

> "(1) regulating the modes in which a writ of seizure and sale may be executed, and the manner in which seizure may be made of *any property* seizable thereunder, ..."
>
> (the emphasis is mine).

It is clear from the Interpretation Act that "property" in its unqualified form, must mean both movable and immovable property, an interpretation placed beyond a doubt by the use of the word "any" in paragraph (1). Examining the Rules, it is also clear that writs of seizure and sale have been restricted only to movable property, which I see is really an exercise of discretion by the Rules Committee *within* the limit prescribed under paragraph (1), and it does not now leave it open to a execution creditor to argue that he can issue a writ of seizure and sale against immovable property.

All considered, I rejected the arguments of learned counsel and ordered that interest on the judgment debt be at the rate of 8% pursuant to Order 42 rule 12 of the Rules.

Order accordingly.

Solicitors: *Lim, Ganesh & Liu.*

MALAYSIAN REPORTS

CITIBANK N.A. v. OOI BOON LEONG & ORS.

[F.C. (Raja Azlan Shah C.J. (Malaya), Chang Min Tat & Salleh Abas F.JJ.) May 21 & July 2, 1980]

[Kuala Lumpur — Federal Court Civil Appeal No. 21 of 1979]

Contract — Contract of guarantee — Variation without surety's consent — Alteration unsubstantial and to the benefit of sureties — Waiver of rights by sureties — Contracts Act, 1950, s. 86.

Banking — Advances given to company — Guarantee by directors of company — Alteration in terms of contract — Alterations unsubstantial and to the benefit of sureties — Waiver of rights by sureties.

Practice and Procedure — Action on contract of guarantee — Certificate of indebtedness conclusive — Summary Judgment — R.S.C. 1957, O. 14.

Evidence — Written contract — Factual background to contract — Evidence Act, 1950, ss. 91 & 92.

In this case the appellant bank sued the respondents on a contract of guarantee for banking accommodation given to a company. The respondents were the directors of the company and in the contract of guarantee they had agreed in effect to waive their rights in respect of any variation or alteration of the contract between the appellant bank and the company. The advances were not repaid and the appellant bank sued the respondents. The appellant bank then applied for summary judgment under Order 14 of the Rules of the Supreme Court. The Assistant Registrar made an order in terms but this order was reversed in the High Court. The respondents had contended that their liabilities under the guarantee were conditional on the bank securing certain acts on the part of the company, the directors and the shareholders. Such acts were not contained in the guarantee but were contained in a letter which set out the terms and conditions of the loan. The respondents relied on the fact that the bank had not obtained (a) a valid debenture on the company's assets containing a provision to enable receivers to be appointed in the event of default; (b) a letter of undertaking from the shareholders who held 40% of the issued share capital not to divest their shareholdings without the bank's consent.

Held: (1) the letter from the bank containing the terms and conditions of the loan did not fall within the category of negotiations so as to be caught by the prohibitory provisions of the Evidence Act but gave factual background which was admissible;

(2) the variations, if any, in this case were so fleeting and patently non-prejudicial to the respondents as to fall into the *de minimis non curat lex* rule. In this case the bank had obtained an order for the sale of the assets of the company under the debenture and there was no evidence that any of the shareholders had in fact transferred their shares;

(3) in any event the contract of guarantee in this case contained express provisions giving the bank the right to do or omit to do certain things without thereby prejudicing the right against the respondents. As the respondents had agreed to waive any variation or alteration and the bank had proceeded with the performance of the contract on that basis it would be inequitable to allow them to resile from the contract;

(4) in this case the respondents were bound under the contract of guarantee to accept the certificate of indebtedness duly executed by the Vice-President of the bank as conclusive evidence of the debt due to the bank. On this footing the bank was entitled to summary judgment.

Cases referred to:-

(1) *Prenn* v. *Simmonds* [1971] 3 All E.R. 237, 241.
(2) *Holme* v. *Brunskill* (1878) 3 Q.B.D. 495, 505.
(3) *National Bank of Nigeria Ltd.* v. *Awolesi* [1964] 1 W.L.R. 1311, 1316.
(4) *Rees* v. *Berrington* (1795) 30 E.R. 765, 767.
(5) *Polak* v. *Everett* (1876) 1 Q.B.D. 669, 677.
(6) *Dobbs* v. *National Bank of Australasia Ltd.* (1935) 53 C.L.R. 643.
(7) *Bache & Co.* v. *Banque Vernes* [1973] 2 LL.L.R. 437.